Office - Supreme Court, U.S.
FILED
DEC 17 1982
ALEXANDER L. STEVAS,
CLERK

Case No. 82-704

In the Supreme Court of the United States

October Term, 1982

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,

Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO,

and

OFFICE OF CONSUMERS' COUNSEL,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF OHIO

REPLY BRIEF AND SUPPLEMENTAL APPENDIX OF APPELLANT OPPOSING THE MOTION TO DISMISS OR AFFIRM

Of Counsel:

ALAN D. WRIGHT
Vice President-Public Affairs and Legal
CRAIG I. SMITH
Senior Counsel
The Cleveland Electric Illuminating Company
55 Public Square
Cleveland, Ohio 44113

ALAN P. BUCHMANN
Counsel of Record
RICHARD W. McLAREN, JR.
Squire, Sanders & Dempsey
1800 Union Commerce Building
Cleveland, Ohio 44115
(216) 687-8500

Attorneys for Appellant, The Cleveland Electric Illuminating Company

TABLE OF CONTENTS

	Page
Table of Authorities	i
Introductory Statement	1
Argument	2
I. THE DOCTRINES OF *RES JUDICATA* AND COLLATERAL ESTOPPEL ARE TOTALLY INAPPLICABLE TO THIS CASE.	2
II. AS APPLIED BELOW TO REDUCE APPELLANT'S RATES, OHIO REVISED CODE SECTIONS 4905.22 AND 4909.15(A)(4) CONFISCATE APPELLANT'S PROPERTY WITHOUT DUE PROCESS OF LAW.	7
Conclusion	10

CONTENTS OF SUPPLEMENTAL APPENDIX

Ohio Statutes:	
Ohio Revised Code §§ 4905.26, 4905.70, 4909.154	4, 8

TABLE OF AUTHORITIES

Court Cases

Beatrice Foods Co., Inc. v. Lindley, 70 Ohio St. 2d 29, 434 N.E.2d 727 (1982)	5
Bluefield Water Works v. Pub. Serv. Comm., 262 U.S. 679 (1923)	9
Central Maine Power Co. v. Pub. Util. Comm., 433 A.2d 331, 344-345 (Maine Supreme Court, 1981)	7
Chambers v. Mississippi, 410 U.S. 284 (1973)	9
Commissioner v. Sunnen, 333 U.S. 591 (1948)	5

	PAGE
Consumers' Counsel v. Pub. Util. Comm. (CEI), 67 Ohio St.2d 153, 437 N.E.2d 586 (1981); CEI Appx. H-1 through H-24.	1
Consumers' Counsel v. Pub. Util. Comm. (Toledo Edison), 1 Ohio St.3d 22, 437 N.E.2d 586 (1982)	5, 6
Davis v. O'Hara, 266 U.S. 314 (1924)	6
Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591 (1944)	6, 9
Hathorn v. Lovorn, 50 U.S. L.W. 4664 (1982)	6
Henry v. Mississippi, 379 U.S. 443 (1965)	9
Hicks v. Miranda, 422 U.S. 332 (1975)	2
Mississippi River Fuel Corp. v. Fed. Pwr. Comm., 163 F.2d 433 (1947)	9
NEPCO Mun. Rate Comm. v. Fed. Energy Reg. Comm., 668 F.2d 1327, 1333-1335 (D.C. Cir., 1981), *cert. den.* 50 U.S.L.W. 3978 (1982)	7
New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928)	9
Norwood v. McDonald, 142 Ohio St. 299, 52 N.E.2d 67 (1943)	5
Ohio Utilities Co. v. Pub. Util. Comm., 58 Ohio St.2d 153, 389 N.E.2d 483 (1979)	4
Panhandle Eastern Pipe Line Co. v. Pub. Util. Comm., 56 Ohio St.2d 334, 383 N.E.2d 1163 (1978)	6
Reece v. Georgia, 350 U.S. 85 (1955)	6
Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62 (1948)	3

	PAGE
State of Ohio v. The Western Union Tel. Co., 154 Ohio St. 511, 97 N.E.2d 2 (1951)	3
Street v. New York, 394 U.S. 576 (1969)	9
West Ohio Gas Co. v. Pub. Util. Comm. (No. 1), 294 U.S. 63 (1935)	9
Administrative Decisions	
Rochester Gas & Elec. Corp., 45 PUR 4th 386, 403-411 (N.Y. Pub. Serv. Comm., 1982)	7
Toledo Edison Co., 42 PUR 4th 568 (Ohio Pub. Util. Comm., 1981)	4
Virginia Electric & Power Co., 29 PUR 4th 65 (Virginia State Corp. Comm., 1979)	7
STATUTES	
28 U.S.C. 1257(2)	9
Ohio Revised Code § 4905.22	1, 6, 7, 8, 9
Ohio Revised Code § 4905.26	4
Ohio Revised Code § 4905.70	8
Ohio Revised Code § 4909.15(A)(1)	8
Ohio Revised Code § 4909.15(A)(4)	1, 6, 7, 8, 9
Ohio Revised Code § 4909.154	8
OTHER	
R. STERN AND E. GRESSMAN, SUPREME COURT PRACTICE, 380-381 (5th ed. 1978)	3

INTRODUCTORY STATEMENT

Appellee, Office of Consumers' Counsel (OCC), has filed a Motion To Dismiss Or Affirm (OCC Motion). This Court should overrule that Motion and allow plenary consideration.

Setting aside the conflicting positions taken by OCC in the several proceedings concerning this matter, what is *not* disputed deserves emphasis. OCC does not dispute that Appellant, The Cleveland Electric Illuminating Company (CEI), prudently initiated construction of four electric generating units, prudently spent $56.4 million planning and engineering them, and prudently cancelled them on January 23, 1980. OCC does not dispute that Ohio Revised Code Section 4905.22 requires CEI to provide adequate service and facilities in the future, nor that base load generating units take a decade or more to build. OCC does not dispute that the Uniform System of Accounts incorporated in the Ohio Administrative Code required CEI to postpone recovery through rates *of* the $56.4 million until the units went into service. OCC does not dispute that the same Uniform System of Accounts provided for the recovery *of* these costs if the units had to be abandoned before the investor had obtained recovery of his investment through accumulated depreciation. (*See* Account 182, quoted in full in CEI Jurisdictional Statement, p. 18).

Indeed, OCC does not dispute that the validity of Ohio Revised Code Sections 4905.22 and 4909.15(A)(4), as construed in *Consumers' Counsel v. Pub. Util. Comm. (CEI)*, 67 Ohio St.2d 153 (1981)[1] and applied to CEI in *this* case, was "drawn into question" before the Ohio Supreme Court on grounds that they are repugnant to the Fifth and Fourteenth Amendments, and that the decision of the Ohio Supreme Court below was in favor of the

[1] Reprinted in CEI's Appendix at pages H-1 through H-24. Hereinafter cited as *Consumers' Counsel*.

validity of those statutes as construed and applied. OCC expressly admits (Motion, p. 29) that the dismissal below "affirmed" the decision in *Consumers' Counsel.*

OCC admits (p. 18) that the COI Order of the Public Utilities Commission of Ohio (Commission) here appealed *"reduced Appellant's rates,* removing therefrom the expenditures associated with the terminated nuclear units." (Emphasis added). Finally, OCC does not even dispute the *substantiality* of the constitutional question presented. If the Ohio statutes, as construed and applied, are confiscatory, as Appellant contends here, then the confiscation has now occurred. Appellant CEI respectfully submits that the monumental importance of this case to CEI and the utility industry requires plenary consideration by this Court.

ARGUMENT

I. THE DOCTRINES OF *RES JUDICATA* AND COLLATERAL ESTOPPEL ARE TOTALLY INAPPLICABLE TO THIS CASE.

OCC presents arguments which are all variations on *res judicata* or, perhaps more correctly, collateral estoppel themes. OCC asserts (OCC Motion, pp. 7-16) that this Court's dismissal of CEI's appeal from *Consumer's Counsel* "for want of a properly presented federal question" (Case No. 81-1002; 71- L.Ed. 2d 455) was a decision "on the merits (OCC Motion, p. 16) of the constitutional issue CEI is now placing before this Court. This contention, of course, is baseless. In citing and relying on *Hicks v. Miranda,* 422 U.S. 322 (1975), OCC conveniently overlooks the fact that the Court was addressing the effect of a dismissal "for want of a *substantial* federal question" (emphasis in the original) and, moreover, that the Court carefully premised its discussion by stating that "[a] federal constitutional issue [had been] properly presented" in that case. Obviously, therefore, nothing in *Hicks* can be read to support OCC's claim that a dismissal

"for want of a properly presented federal question" is a determination on the merits. *See* R. STERN AND E. GRESSMAN, SUPREME COURT PRACTICE, 380-381 (5th ed. 1978).[2] This Court has not decided the substantial federal question raised by CEI here.[3]

This appeal is from an entirely new and different case from the one which this Court considered in Case No. 81-1002. The reasons for this Court's prior dismissal have no bearing on *this* case since the dismissal was *not* on the merits.

OCC's claim (Motion, p. 13) that "The COI Order was merely a continuation of the earlier proceedings requiring compliance with the Ohio Court's mandate" is wrong, both factually and legally. As Exhibit I to Appellant's Jurisdictional Statement shows, *Consumers' Counsel* and Case No. 81-1002 before this Court were appeals from CEI's 1979 Case, the 1980 Case superseded[4] those rates, and the COI case reducing the 1980 rates is before this Court in *this* proceeding.[5]

---

[2] *See also Colorado Springs Amusements, Ltd. v. Rizzo*, 428 U.S. 913, 914 n.1 (1976, Justice Brennan dissenting); *Doe v. Delaware*, 450 U.S. 382, 383 n.4 (1981, Justice Brennan dissenting).

[3] OCC also assumes that this Court previously dismissed "for want of a properly presented federal question" because the confiscation question was allegedly raised on rehearing and was, therefore, too *late*. It could well be argued that the prior appeal was too *early*, since the decision in *Consumers' Counsel* lacked finality. Since that decision "remanded" to the Commission for a "redetermination" of CEI's allowable expenses (CEI Appx., H-20), plainly the way remained open for the Commission "to set a profitable rate . . . which might well satisfy the losing party to acquiesce in the disposition of the earlier issue." *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 71 (1948). *See also State of Ohio v. The Western Union Tel. Co.*, 154 Ohio St. 511, 97 N.E.2d 2 (1951).

[4] 67 Ohio St. 2d 153, 154 n.3, CEI Appx. H-3.

[5] The Commission simultaneously initiated a Commission Ordered Investigation into Toledo Edison's existing rates, which is discussed *infra*.

The Commission concluded that an investigation of the *1979* rates that had been before the Ohio Court in *Consumers' Counsel* "would be a meaningless exercise." (COI Order, CEI Appx. E-4). Instead, the Commission chose "to implement the Supreme Court's mandate through the *initiation* of this *proceeding.*" (COI Order, CEI Appx. E-4). The Commission found that it could do so pursuant to Ohio Revised Code Section 4905.26 despite the facts that the 1980 rates "are presumptively just and reasonable" and that "there is no remand or mandate" in the 1980 Case. (COI Order, CEI Appx. E-5). In reducing CEI's 1980 rates here, the Commission was well aware that those rates had been set using a calendar 1980 test year (COI Order, CEI Appx. E-5) and that the 1979 rates, "remanded" in *Consumers' Counsel,* had been set using a calendar 1979 test year (CEI Appx., J-3). OCC's assertion of *res judicata* is thus wholly without foundation. In *this* case, the confiscation has plainly occurred, CEI is "out of pocket," and the decision is final.

Legally, it is settled in Ohio that a proceeding initiated by the Commission to investigate the reasonableness of a utility's existing rates pursuant to Ohio Revised Code Section 4905.26, as the Commission did below, is "*not* a rehearing or a continuation of [a] prior application for a rate increase" but is "*a separate investigation.*" *Ohio Utilities Co. v. Pub. Util. Comm.*, 58 Ohio St. 2d 153, 159, 389 N.E. 2d 483, 487 (1979, emphasis added). *Ohio Utilities* was relied upon for precisely this proposition when the Ohio Court affirmed the Commission's initiation of a Section 4905.26 proceeding[6] to investigate "the reasonableness of [Toledo Edison's] rate schedules in the light of *new law,* such as our decision in *Consumers' Counsel,*

[6] Toledo Edison was not a party in *Consumers' Counsel* but its existing rates included an amortization of its investment in these same cancelled plants. *See Toledo Edison Co.*, 42 PUR 4th 568, 589 (1981).

supra." *Consumers' Counsel v. Pub. Util. Comm.* (*Toledo Edison*), 1 Ohio St.3d 22, 24, 437 N.E.2d 586, 588 (1982).

The present case for CEI is a new and separate cause of action, exactly like the Commission Ordered Investigations of *Ohio Utilities* and of *Toledo Edison*,[1] and the doctrine of *res judicata* is not applicable. *Norwood v. McDonald*, 142 Ohio St. 299, 52 N.E.2d 67 (1943).

OCC is also plainly wrong in stating that this appeal "seeks to relitigate *the same issue* based upon the same facts." (OCC Motion, p. 22). As this Court itself has said in the context of income tax issues that arise in different tax years, "Each year is the origin of a new liability and of a separate cause of action." Thus, a judgment addressing an issue in one year is *res judicata* only in a proceeding "*involving the same claim and the same tax year.*" *Commissioner v. Sunnen*, 333 U.S. 591, 598 (1948, emphasis added). Indeed, the Ohio Court has adopted the same approach. *Beatrice Foods Co., Inc. v. Lindley*, 70 Ohio St.2d 29, 434 N.E.2d 727, 731 (1982). In parallel fashion, this case involves a different rate year from that before the courts in *Consumers' Counsel* and, thus, the question before the Ohio Court and this Court plainly involves "a new liability and . . . a separate cause of action." *Sunnen, supra.*

Likewise, even assuming that the doctrine of collateral estoppel may be applied to questions of law in addition to questions of fact, "collateral estoppel [applies] only as to those matters . . . which were actually presented and determined in the first suit." *Sunnen, supra.* Since the Ohio Court has never addressed the federal issue, which has been "drawn in question" at every available opportunity

---

[1] The Commission's refusal to reduce Toledo Edison's rates after this Investigation plainly belies OCC's claim (Motion, p. 1) that the Commission's decisions in these Investigations were mere "mechanical manifestation[s]" of *Consumers' Counsel.*

since the Ohio Court announced this "new law,"[8] collateral estoppel cannot possibly apply.[9] CEI unequivocably argued in *this* case that its property had been confiscated, and *OCC does not deny it.*[10]

Even assuming the federal question was presented to the Ohio Court too late in *Consumers' Counsel,* surely that fact does not relieve the Ohio Court from considering the question in all subsequent cases, for all time, as OCC seems to imply, nor should it prevent this Court from *ever* considering the question when it is properly presented in such subsequent cases.[11]

---

[8] *Consumers' Counsel v. Pub. Util. Comm. (Toledo Edison),* 1 Ohio St.3d 22, at 24, 437 N.E. 2d 586, 588 (1982).

[9] The *Commission* has never addressed the constitutionality of the statutes, as construed and applied, because it does not have jurisdiction to do so. *Panhandle Eastern Pipe Line Co. v. Pub. Util. Comm.,* 56 Ohio St.2d 334, 337, 383 N.E.2d 1163, 1165 (1978). Moreover, OCC can hardly assert that the Ohio Court implicitly decided the constitutional issue previously in *Consumers' Counsel* in light of its argument to the opposite effect to this Court in that case. *See also* OCC Motion, p. 6, admitting that the Ohio Court had *not* decided the constitutional question.

[10] On appeal to the Ohio Court in this case, CEI's Proposition of Law No. 2 stated:

> "Ohio Revised Code § 4905.22 and § 4909.15(A)(4), as construed by this Court, directly conflict with the proscription of the Fifth and Fourteenth Amendments to the Constitution of the United States prohibiting confiscation of private property without due process of law."

Proposition of Law No. 3 stated:

> "Ohio Revised Code § 4905.22 and § 4909.15(A)(4), as construed, directly conflict with the Supreme Court's decision in *Federal Power Commission v. Hope Natural Gas Co.,* 320 U.S. 591 (1944)."

[11] Likewise, the doctrine of 'law of the case' also does not affect this Court's jurisdiction here. Even a ruling by the State court that an earlier decision constitutes the law of the case does not deprive this Court of jurisdiction to reexamine the question. *Davis v. O'Hara,* 266 U.S. 314, 321 (1924); *Reece v. Georgia,* 350 U.S. 85, 87 (1955); *Hathorn v. Lovorn,* 50 U.S. L.W. 4664 (1982).

II. AS APPLIED BELOW TO REDUCE APPELLANT'S RATES, OHIO REVISED CODE SECTIONS 4905.22 AND 4909.15(A)(4) CONFISCATE APPELLANT'S PROPERTY WITHOUT DUE PROCESS OF LAW.

OCC's attention to the merits is short, but inaccurate. OCC argues (p. 38) that CEI seeks to have the investors "insulated from all risk" associated with plant construction. That argument is totally false. CEI sought recovery *of* the $56.4 million actually spent planning and engineering these units. CEI did *not* seek and has never sought "profit" *on* that $56.4 million. The *undisputed* testimony of CEI witness Maugans in the 1979 Case (CEI Ex 4A, p. 27) showed that a ten year amortization, without rate base treatment, would produce a nearly equal sharing of the burden between the ratepayer and the investor. Simply put, the Commission's Order in the 1979 Case took from the investor the time value of his prudently invested money for the next ten years (the amortization period), but allowed the investor eventually to recover his actual prudent investment.[12] The Ohio Court reversed that treatment in *Consumers' Counsel*. The Commission's COI Order, here under appeal, then confiscated that actual investment ($56.4 million) from the investor by removing

---

[12] This proposition has been adopted in virtually every case decided on this subject, and they are cited in the Table of Authorities of CEI's Jurisdictional Statement. *See particularly Virginia Electric & Power Co.*, 29 PUR 4th 65 (Virginia State Corp. Comm., 1979, discussing the allowed amortization at page 76 and the denial of rate base treatment at page 80; Commissioner Shannon's dissent from this denial at pages 95-97 was quoted to the Ohio Court in CEI's first brief in *Consumers' Counsel*); *NEPCO Mun. Rate Comm. v. Fed. Energy Reg. Comm.*, 668 F.2d 1327, 1333-1335 (D.C. Cir., 1981), *cert. den.* 50 U.S.L.W. 3978 (1982); *Central Maine Power Co. v. Pub. Util. Comm.*, 433 A.2d 331, 344-345 (Maine Supreme Court, 1981); *Rochester Gas & Electric Corp.*, 45 PUR 4th 386, 403-411 (N.Y. Pub. Serv. Comm., 1982).

that one line-item of cost from rates without any consideration of any other changes in revenues, expenses, rate base or rate of return. The Ohio Court dismissed Appellant's appeal without opinion. The issue here is whether the State of Ohio may constitutionally *require* utilities to invest in generating units which take ten or more years to build, *require* postponement of recovery through rates, and then refuse any recovery *at all of* the capital outlay – not a profit on it – even where it was *prudently* made.[13] *See* Ohio Revised Code Section 4909.154.

OCC errs when it argues (p. 26) that only Ohio Revised Code Section 4909.15(A)(4) is involved here. The Ohio Court itself assumed that Section 4905.22 "impose[d] a duty" on CEI to make these expenditures "to plan for the future." (67 Ohio St.2d at 164; CEI Appx. H-14). Without Section 4905.22, CEI would not have had a statutory duty to risk this capital to build sufficient generating capacity for the future. CEI would not have had to make the hard choice to build, or not to build.

OCC misses the point when it argues (pp. 26-31) that the Ohio Court strictly limited its determination in *Consumers' Counsel* to construing Ohio statutes, and, therefore, no federal question is presented here. By that test, no

---

[13] Assume that demand for electricity is projected to grow at a certain rate, requiring the construction of a new generating unit. Ohio Revised Code Section 4905.22 requires an Ohio utility to begin construction. Under present Ohio law, the utility is "damned if it does and damned if it does not." If construction is begun, the costs may not be recovered currently, but must be deferred and charged to the project. If growth in demand then slows, making it prudent to cancel, the utility loses no matter what it does. Under Ohio law as now construed, if the project is continued, the unit could be excluded from rate base as "excess capacity" (R.C. § 4905.70) and, therefore, not "used and useful" property (R.C. § 4909.15(A)(1). The entire investment is then lost. If the utility prudently cancels, the utility loses the accumulated costs which had been deferred and charged to the project, under *Consumers' Counsel*. This classic "Catch-22" is unconstitutional.

state court decision involving a state statute would be reviewable by this Court unless the state court chose to address the constitutional issue. 28 U.S.C. 1257(2) is not so limited.

On the other hand, OCC properly admits that the Ohio Court's dismissal of CEI's appeal here necessarily "affirmed" *Consumers' Counsel* as applied. (OCC Motion, p. 29). It surely did, in the face of an explicit constitutional challenge to Ohio Revised Code Sections 4905.22 and 4909.15(A)(4) as newly construed in *Consumers' Counsel* and then *applied* in the Commission's COI Order. The record as a whole in *this* case clearly shows that "the federal claim was brought to the attention of the state court with fair precision and in due time." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, at 67 (1928); *Street v. New York*, 394 U.S. 576, 581-585 (1969); *Henry v. Mississippi*, 379 U.S. 443 (1965); *Chambers v. Mississippi*, 410 U.S. 284 (1973). The Ohio Court may not deprive this Court of jurisdiction by the simple expedient of refusing to pass on the federal question.

OCC's argument (pp. 32-39) that no confiscation has occurred because CEI's 1979 Annual Report predicted that "the resolution of these matters should not have a *material* adverse impact on the *financial position* of the Company" is erroneous. That statement addressed the SEC's *balance sheet* test, certainly not this Court's test for confiscation. The Commission's COI Order, appealed here, requires a one-time write-off of $32 million, 20% of 1981 net *earnings*, unless this Court acts. That is plainly confiscation. *Bluefield Water Works v. Pub. Serv. Comm.*, 262 U.S. 679 (1923); *West Ohio Gas Co. v. Pub. Util. Comm. (No. 1)*, 294 U.S. 63 (1935); *Fed. Pwr. Comm. v. Hope Natural Gas Co.*, 320 U.S. 591 (1944); *Mississippi River Fuel Corp. v. Fed. Pwr Comm.*, 163 F.2d 433, at 437 (1947).

CONCLUSION

In its COI Order the Commission declined to examine the impact of disallowance as an expense of the costs associated with the cancelled plants on the other parts of the ratemaking formula (revenues, expenses, rate base and rate of return) and removed this expense from the rates it found fair and reasonable in Appellant's 1980 Case. The confiscation has occurred and the result is final unless this Court acts. This case presents this Court with a clear-cut issue: Is it constitutional for Ohio to require prudent investment by a public utility to insure adequate service and facilities and simultaneously to prohibit the utility from any opportunity whatsoever for recovery *of* that prudent investment? The Ohio statutes, which require such a result as construed and applied here, plainly confiscate the utility's property.

For the foregoing reasons, the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution, and the Motion To Dismiss Or Affirm should be denied.

Respectfully submitted,

Of Counsel:

ALAN D. WRIGHT
Vice President-Public Affairs and Legal
CRAIG I. SMITH
Senior Counsel
The Cleveland Electric Illuminating Company
55 Public Square
Cleveland, Ohio 44113

ALAN P. BUCHMANN
Counsel of Record
RICHARD W. MCLAREN, JR.
Squire, Sanders & Dempsey
1800 Union Commerce Building
Cleveland, Ohio 44115
(216) 687-8500

Attorneys for Appellant, The Cleveland Electric Illuminating Company

SUPPLEMENTAL APPENDIX

§ 4905.26 Complaints as to service. (GC § 614-21)

Upon complaint in writing against any public utility by any person, firm, or corporation, or upon the initiative or complaint of the public utilities commission, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, or that any regulation, measurement, or practice affecting or relating to any service furnished by said public utility, or in connection with such service, is, or will be, in any respect unreasonable, unjust, insufficient, unjustly discriminatory, or unjustly preferential, or that any service is, or will be, inadequate or cannot be obtained, and, upon complaint of a public utility as to any matter affecting its own product or service, if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof, and shall publish notice thereof in a newspaper of general circulation in each county in which complaint has arisen. Such notice shall be served and publication made not less than fifteen days nor more than thirty days before hearing and shall state the matters complained of. The commission may adjourn such hearing from time to time.

The parties to the complaint shall be entitled to be heard, represented by counsel, and to have process to enforce the attendance of witnesses.

Upon the filing of a complaint by one hundred subscribers or five per cent of the subscribers to any telephone exchange whichever number be smaller, or by the legislative authority of any municipal corporation served

by such telephone company that any regulation, measurement, standard of service, or practice affecting or relating to any service furnished by said telephone company, or in connection with such service is, or will be, in any respect unreasonable, unjust, discriminatory or preferential, or that any service is, or will be inadequate or cannot be obtained, the public utilities commission shall fix a time for the hearing of such complaint.

The hearing provided for in the next preceding paragraph shall be held in the county wherein resides the majority of the signers of such complaint, or wherein is located such municipal corporation. Notice of the hearing shall be served upon the telephone company complained of, upon each municipal corporation served by said telephone company in the county or counties affected, and shall be published for not less than three consecutive weeks in a newspaper of general circulation in the county or counties affected.

Such hearing shall be held not less than fifteen nor more than thirty days after the third publication of such notice.

HISTORY: GC § 614-21; 102 v 549(556), § 23; 125 v 613(616). Eff 10-26-53.

§ 4905.70 [Energy conservation programs.]

The public utilities commission shall initiate programs that will promote and encourage conservation of energy and a reduction in the growth rate of energy consumption, promote economic efficiencies and take into account long-run incremental costs. Notwithstanding sections 4905.31, 4905.33, 4905.35, and 4909.151 [4909.15.1] of the Revised Code, the public utilities commission shall examine and issue written findings on the declining block rate structure, lifeline rates, long-run incremental pricing,

peak load and off-peak pricing, time of day and seasonal pricing, interruptible load pricing, and single rate pricing where rates do not vary because of classification of customers or amount of usage. The public utilities commission shall establish criteria for the investigation, identification, and remedy of the existence of any *excess capacity* in the generating systems of electric light companies. The public utilities commission, by a rule adopted no later than October 1, 1977, and effective and applicable no later than November 1, 1977, shall require each electric light company to offer to such of their residential customers whose residences are primarily heated by electricity the option of their usage being metered by a demand or load meter. A customer who selects such option may, under the rule, be required by the company, where no such meter is already installed, to pay for such meter and its installation. The rule shall require each company to bill such of its customers who select such option for those kilowatt hours in excess of a prescribed number of kilowatt hours per kilowatt of billing demand, at a rate per kilowatt hour that reflects the lower cost of providing service during off-peak periods.

HISTORY: 137 v H 230. Eff 10-9-77. (Emphasis added).

[§ 4909.15.4] § 4909.154 [Consider management policies, practices and organization.]

In fixing the just, reasonable, and compensatory rates, joint rates, tolls, classifications, charges, or rentals to be observed and charged for service by any public utility, the public utilities commission may consider the management policies, practices, and organization of the public utility. The commission may require such public utility to supply information regarding its management policies, practices, and organization.

SUPPLEMENTAL APPENDIX

If the commission finds after a hearing that the management policies, practices, or organization of the public utility are inadequate, inefficient, or improper, the commission may recommend management policies, management practices, or an organizational structure to the public utility.

In any event, the public utilities commission shall not allow such operating expenses of a public utility as are incurred by the utility through management policies or administrative practices that the commission considers *imprudent*.

HISTORY: 136 v S 94. Eff 9-1-76. (Emphasis added).